

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of

SCRIPPS HOWARD BROADCASTING
COMPANYFor Renewal of License of
Station WMAR-TV,
Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC.

For a Construction Permit for
Television Facility on
Channel 2 at
Baltimore, Maryland

MM Docket No. 93-94

File No. BRCT-910603KY

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FEDERAL COMMUNICATIONS COMMISSION
LEGAL DIVISION

File No. BPCT-910903KE

To: The Honorable Richard L. Sippel
Administrative Law JudgePETITION TO ENLARGE THE ISSUES

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys and pursuant to Section 1.229 of the Commission's rules, hereby petitions the Presiding Judge to enlarge the issues in this proceeding to include the following issue against Scripps Howard Broadcasting Company ("Scripps Howard"):^{1/}

^{1/} Four Jacks is aware that in a Public Notice, FCC 94-204, released August 6, 1994, the Commission issued a "Modification of FCC Comparative Proceedings Freeze Policy." It is unclear whether the modification applies to comparative renewal proceedings.

To determine whether, in light of the recent judgment against Scripps Howard for violations of the California Unfair Practices Act, Business and Professions Code including locality discrimination and unfair competition and for violations of county and city codes with respect to its pricing of cable television services, Scripps Howard possesses the requisite qualifications to be a Commission licensee.

I. BACKGROUND

1. Scripps Howard's qualifications to remain a Commission licensee are presently under investigation to determine whether Scripps Howard misrepresented facts and/or lacked candor regarding the documentation for its renewal expectancy in this proceeding. In addition to the misrepresentation issue, the Commission should designate for hearing an issue concerning recently adjudicated anticompetitive misconduct by a company ultimately controlled by Scripps Howard, Sacramento Cable Television ("SCT"). SCT, a cable operator in which Scripps Howard's wholly-owned subsidiary is general partner and 95% equity owner, recently has been found by a California court to have engaged in numerous anticompetitive practices, including violations of the California Unfair Practices Act, Business and Professions Code including locality discrimination and unfair competition and for violations of county and city codes with respect to its pricing of cable television services.^{2/} In 1987, that same company (ultimately owned by Scripps Howard) was found

^{2/} Judgment Order entered June 30, 1994 by the Honorable Roger K. Warren of the Superior Court of California, County of Sacramento. A copy of the Order is attached to Scripps Howard's Notice Pertaining to Earlier Filed Amendment to Application (filed July 27, 1994).

to have obtained its cable franchise through a "sham" process.^{3/}

II. THIS PETITION IS TIMELY FILED

2. The facts giving rise to this petition came to light through the "Notice Pertaining to Earlier Filed Amendment to Application" (the "Notice") filed by Scripps Howard in the above-referenced proceeding. That Notice advised the Commission of a final adjudication against a partnership controlled by a corporate subsidiary of the renewal applicant, Scripps Howard. The adjudication was made final by Order of a Judge dated June 30, 1994, and the Notice was served on Four Jacks via the United States mail on July 27, 1994. This petition is timely filed within fifteen (15) days of Scripps Howard's filing of the Notice and thus meets the requirements of Section 1.229(a) of the Commission's rules. Moreover, the petition raises a question of "probable decisional significance" under Section 1.229(c) of the Commission's rules so as to independently warrant consideration.

III. THE LEGAL PREDICATE FOR DESIGNATING ISSUES

3. The FCC examines a licensee's character qualifications for clues as to a party's expected performance as a Commission licensee. Policy Regarding Character Qualifications in Broadcast

^{3/} Pacific West Cable Co. v. City of Sacramento, 672 F. Supp. 1322 (E.D. Cal. 1987). A description of this proceeding can be found in Four Jacks' earlier filings, including Four Jacks' Request to Certify Application for Review (filed April 8, 1993); Four Jacks' Petition to Enlarge Issues Against Scripps Howard Broadcasting Company (filed May 13, 1993); Four Jacks' Comments on "Motion for Acceptance of Amendment" (filed May 20, 1994).

Licensing, 102 FCC 2d 1179 (1986), recon. granted in part, denied in part 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987), modified, Policy Statement and Order, 5 FCC Rcd 3525 (1990), on recon., 6 FCC Rcd 3448 (1991), modified 7 FCC Rcd 6564 (1992) ("Character Policy Statement"). Part of a broadcast licensee's mandate is to serve the public interest, rather than its private competitive interests. See, e.g., Clearview TV Cable, 64 FCC 2d 897, 900 (1977); Carolinas Advertising, Inc., 42 FCC 2d 1027 (1973).

4. The Commission has long been concerned with the type of media-related anticompetitive activity for which Scripps Howard has recently been convicted. See Character Policy Statement, 102 FCC 2d at 1201. That is why FCC Form 303-S, the license renewal application contains a specific question (Question 6) which asks:

Since the filing of the applicant's last renewal for this station or other application, has an adverse finding been made or final action been taken by any court or administrative body with respect to the applicant or parties to the applicant in a civil or criminal proceeding, brought under any provision of law relating to . . . mass media related antitrust or unfair competition . . . ?

If the answer is yes to the foregoing question, the Commission requires that the applicant attach a full disclosure statement including an identification of the parties and the disposition of the proceeding.

5. In addition, the Supreme Court has held that the Commission is authorized to take cognizance of anticompetitive conduct of a licensee as an integral part of the Commission's public interest determination. See NBC v. U.S., 319 U.S. 190,

222 (1943). In fact, although the Commission may exercise its judgment as to whether any particular anticompetitive behavior disqualifies a licensee, the Commission may fairly make the inference that "the [anticompetitive] disposition so manifested would continue and if it did it would make [the licensee] an unfit licensee." Id. (quoting the decision below, NBC V. U.S., 47 F. Supp, 940, 944 (S.D.N.Y.)). In fact, as part of its stewardship of the public interest, the Commission must consider the policies underlying antitrust and unfair competition laws in determining the fitness of a licensee. RKO General, Inc., 47 RR 2d 921 (1980).

6. The Commission has added an issue to investigate anticompetitive conduct in comparative hearings involving conduct much less egregious than that of Scripps Howard. For example, in Metrowest Corp., 48 RR 2d 1281 (Adm. L.J. 1981), an issue was added against an applicant for a new television station when the principal of that applicant was also the CEO of another company which had repeatedly engaged in questionable trade practices, including the impairment of broadcast competition. The second company had been investigated by the Federal Trade Commission at least three times, resulting in two consent orders and one cease and desist order for its conduct. Id.

7. Scripps Howard's anticompetitive behavior is more blatant than Metrowest's. Previously, a jury in PacWest found Scripps Howard's cable subsidiary guilty of illegal conduct in procuring its Sacramento cable monopoly franchise. Now, another court has found Scripps Howard guilty of illegal behavior in its

cable pricing tactics. The relevance of this continued illegal conduct to Scripps Howard's qualifications to remain a Commission licensee cannot be doubted. Character Policy Statement, 102 FCC 2d at 1202 ("adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction" should be considered in the Commission's character inquiry). This second adjudicated finding of anticompetitive misconduct compels further investigation into Scripps Howard's qualifications to remain a Commission licensee.

CONCLUSION

Accordingly, for the reasons set forth herein, the requested issue should be added against the application of Scripps Howard Broadcasting Company.

Respectfully submitted,

FOUR JACKS BROADCASTING, INC.

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Dated: August 11, 1994

CERTIFICATE OF SERVICE

I, Rhea L. Lytle, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing "PETITION TO ENLARGE THE ISSUES" were sent this 11th day of August, 1994, by first class mail, postage prepaid, to the following:

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